TLE COPY

Office-Supreme Court, U.S.
FILED
FEB 16 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1958

No. 582

VINCENT JOSEPH SPANO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S BRIEF

RITA D. SCHECHTER,
Attorney for Petitioner.

HERBERT S. SIEGAL,
of Counsel.

INDEX TO BRIEF

	PAGE
Opinions Below	1
Jurisdiction	1
Constitutional Provision Involved	1
Questions Presented for Review	2
Statement	3
The Activities of the Police Authorities from January 22, 1957 (the Date of the Killing) and February 1, 1957 (the Date of the Filing of the Indictment)	5
The Events of February 4, 1957	7
The Characters Involved	10
POINT ONE—The refusal on the part of the Assistant District Attorney and the officers of the Police Department of the City of New York to allow defendant who had voluntarily surrendered with his attorney to consult and to confer with said attorney, whom the defendant had previously retained, upon the said defendant's repeated demands for a period of upwards of eight (8) hours, prior to extracting a written confession from the said defendant by overriding and superseding the judgment and will, both of defendant and of defendant's attorney by means of cajoling, trickery and undue influence all of which took place after investigation and subsequent to indictment where the accused was no longer suspect, but a defendant in a judicial proceeding theretofore instituted by said indictment and bench warrant issued pursuant thereto, constituted a denial of due process of law under the XIVth Amendment of the United States Constitution	12
The Right to Counsel	16
Balancing Interests Between Law Enforcement and the Rights of a Defendant	21

PAGE

POINT TWO—The petitioner-defendant herein was denied due process of law under the Fourteenth Amendment by the admission into evidence over objection and exception of a confession which was taken from him involuntarily and while in custody, and after he had been in such custody for upwards of eight hours during all of which time the said defendant demanded and insisted upon consulting with his attorney prior to making any statement, and against which he had been advised until ultimately, and after continued interrogation, the authorities succeeded by coercion in prevailing upon said defendant to relinquish the said advice and to supersede the judgment and advice, both of the defendant and his attorney, thus yielding to the authorities and, by virtue of all of the aforesaid, to render a statement which was thereafter admitted in evidence against the said defendant—all of which occurred subsequent to indictment, and after the defendant, through his attorney, had voluntarily surrendered pursuant to a Bench Warrant issued out of the judicial proceeding instituted by the said indictment 24

POINT THREE—The contention of the respondent that the defendant herein had made a prior confession to Patrolman Bruno is without merit 32

CONCLUSION 34

Authorities Cited

Adams v. U. S. ex rel. McCann, 317 U. S. 269 26
Adamson v. California, 332 U. S. 46 (1947) 14

Betts v. Brady, 316 U. S. 455 ..... 17, 19, 25
Brown v. Allen, 344 U. S. 443 15
Brown v. Mississippi, 297 U. S. 278 14

PAGE

Chandler v. Fretag, 348 U. S. 3 ..... 17, 19, 25
Ciccnia v. LaGay, 357 U. S. 504 ..... 15, 16, 20, 21
Crooker v. California, 357 U. S. 433 ..... 14, 15, 16, 17, 18 20, 21, 31, 32

Fikes v. Alabama, 352 U. S. 191 14
Fusco v. Moses, 304 N. Y. 424 16

Gallegos v. Nebraska, 342 U. S. 55 ..... 22, 27
Glasser v. U. S., 315 U. S. 60 ..... 19, 25, 26

Haley v. Ohio, 332 U. S. 596 28

Lanza v. N. Y. S. Joint Leg. Comm., 3 N. Y. (2d) 92 16
Lisenba v. California, 314 U. S. 219 17
Lyons v. Okhahoma, 322 U. S. 596 29

Malinski v. N. Y., 324 U. S. 401 ..... 14, 29
Mallory v. U. S., 354 U. S. 449 21
Moore v. Michigan, 355 U. S. 155 17

Palko v. Connecticut, 302 U. S. 319 14
People v. McMahon, 15 N. Y. 384 ..... 22, 23
People v. Mondon, 103 N. Y. 211 ..... 22, 23
Powell v. Alabama, 287 U. S. 45 ..... 17, 18, 19

Rider ex rel., 50 California App. 797 16
Rochin v. California, 342 U. S. 165 14

Snyder v. Massachusetts, 291 U. S. 97 14
Spano v. State of New York, 4 N. Y. (2d) 256 .... 1, 3
Stroble v. California, 343 U. S. 181 ..... 15, 16

Thomas v. Arizona, 356 U. S. 390 15
Twining v. New Jersey, 211 U. S. 78 14

Vogue v. Arkansas, 356 U. S. 560 15

Watts v. Indiana, 338 U. S. 49 ..... 14, 30

Constitutional Provisions and Statutes

PAGE

U. S. C. A. Constitutional Amendment 14 ..... 1, 12, 13, 14, 15, 17. 18, 24, 25

28 U. S. C. Sec. 2101(c) 1

28 U. S. C. Sec. 1254(1) 1

28 U. S. C. Sec. 1257 (Sub. 3) 1

U. S. Fifth Amendment 13

N. Y. Constitution Art. 1, Sec. 6 ..... 13, 17

N. Y. State Penal Law, Sec. 1044, Subdiv. 1 ..... 32, 33

N. Y. State Code of Crim. Proc., Sec. 301 5

N. Y. State Code of Crim. Proc., Sec. 395 ..... 15, 24

N. Y. State Code of Crim. Proc., Secs. 8, 188, 189, 308 17

Miscellaneous

Cooley, on Constitutional Limitations, 8th Ed., Vol. I, P. 696 16

Ploscowe, The Development of Present Day Criminal Procedures in Europe and America, 48 Harv. L. Rev. 433 31

Right to Counsel Prior to Trial, 44 Ky. L. J. 103 ... 20

Zechariah Chaffee, Documents on Fundamental Human Rights, Pamphlet 1-3 (1951-1952) p. 1541 20

IN THE

Supreme Court of the United States

October Term, 1958

No. 582

VINCENT JOSEPH SPANO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S BRIEF

Opinions Below

The opinions made, entered and filed in the Court of Appeals of the State of New York are reported in 4 N. Y. (2d) 256.

Jurisdiction

Within the time prescribed by 28 U. S. C. Sec. 2101(c) petitioner served and filed his petition for a Writ of Certiorari to the Court of Appeals of the State of New York as authorized by 28 U. S. C. Section 1254(1) and 28 U. S. C. 1257 Subd. 3.

Constitutional Provision Involved

The Constitutional provision involved in this case is the Fourteenth Amendment of the Constitution of the United States, the pertinent portion of which reads as follows:

Sec. 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *U. S. C. A., Constitution, Amendment 14.*

Questions Presented for Review

I. Was the defendant denied Due Process of Law by the refusal of the police officers and the District Attorney, Bronx County, to allow him to consult with his attorney upon demand being made by him to do so after the said defendant had been voluntarily surrendered by said attorney to the authorities, pursuant to a Bench Warrant which had been issued following an Indictment of the said defendant in a Judicial Proceeding then in full force and in existence at a time when the said defendant was no longer suspect but was a party defendant in said Judicial Proceeding?

II. Was the defendant denied Due Process of Law by the admission into evidence over objection and exception of a confession which was taken from him while in custody, and after he had been in such custody for a period upwards of eight hours, during all of which time the said defendant demanded and insisted upon consulting with his attorney prior to making any statement at all and against which he had been advised, and which advice he had continually adhered to and insisted upon so doing, giving to the authorities nothing but his name until finally after approximately eight hours of continual interrogation, the authorities succeeded by cajoling, tricking and undue influence, in prevailing upon an exhausted defendant to relinquish the said

advice and to substitute and to supersede the judgment and advice both of the defendant and of his attorney to obtain the said confession which was admitted in evidence upon the trial against the said defendant—all of which occurred subsequent to an Indictment and after the defendant through his attorney had voluntarily surrendered pursuant to a Bench Warrant founded upon the Judicial Proceeding instituted by said Indictment.

Statement

The within appeal is taken from an order and judgment of affirmance of the Court of Appeals of the State of New York, rendered on or about April 3, 1958, sustaining and upholding a certain Judgment of Conviction and Sentence of Death rendered in the County Court, Bronx County (Schulz, J. and a Jury) on the 9th day of May, 1957 for the crime of Murder in the First Degree (Section 1044, Subd. 1, Penal Law of the State of New York). The said defendant is now in Sing Sing prison awaiting the execution and enforcement of the said sentence of death, contingent, of course, upon what transpires herein.

Certiorari was granted by this Honorable Court on or about the 15th day of December, 1958.

It might be stated that the judgment of affirmance of the Court of Appeals of the State of New York was by a divided court (four to three) and the opinions rendered in connection therewith are reported in 4 N. Y. (2d) 256.

On January 22, 1957 at or about 6 P. M. the petitioner-defendant and the victim, Frank Palermo, Jr. (aged 28 years) had an altercation which originated by way of argument over money at the Roosevelt Bar and Tavern located at 187th Street and Arthur Avenue, in the Borough and County of Bronx, City of New York; a fight ensued outside the said premises from which it appears that the said Frank Palermo, Jr. (a former professional pugilist of some prominence) administered upon the defendant a cruel

and savage beating, leaving the defendant not only severely injured and bleeding, but also leaving the defendant, with the admonition and demand that the petitioner-defendant bring some money (for no reason at all, other than unlawful demand) to a certain candy store in the area located at 189th Street and Hughes Avenue, Borough of Bronx, City of New York (94-96).* That as it later developed, the said candy store was a rendezvous or hangout for the victim and his cronies, all of whom were ex-convicts (104-106, 121-123, 387, 877-878, 1017-1018, 1091, 1092; pp. 1446, 1466, Record on Appeal).

The petitioner-defendant, following the said fracas, reentered the bar and proceeded to attempt to wash himself of the blood, and at or about 6:10 P. M. left the said premises (903-908).

Thereafter, and at or about 6:15 P. M., on the said 22nd day of January, 1957 and only a short time after the said altercation, the petitioner-defendant was observed by one Peter Gueriero (a thirteen-year-old boy who was in temporary charge of tending the said candy store) entering the same and at separate intervals thereafter, there was heard the discharge of five shots in two volleys, two of which shots penetrated the body of the said Frank Palermo, Jr. killing him almost instantaneously (373-383, 411-414, 425-429).

The petitioner-defendant thereupon left the said premises and was unheard from until February 3, 1957 (a period of approximately 12 days) as will hereinafter appear (2255).

On February 1, 1957, approximately nine (9) days, after the said homicide, and while the defendant was still at large, an Indictment charging the petitioner-defendant with the crime of Murder in the First Degree was found by the

---

* Numbers in parentheses refer to folios of the Record on Appeal, unless otherwise specified.

Grand Jury of Bronx County which said Indictment was filed in the County Court, County of Bronx.

The said Indictment reads as follows:

> "The Grand Jury of the County of Bronx, by this indictment accuse defendant, Vincent Joseph Spano, of the crime of Murder in the First Degree, committed as follows:
>
> The said defendant, in the County of Bronx, on the twenty-second day of January, 1957, wilfully, feloniously and of his malice aforethought, did shoot and kill one Frank Palermo, Jr., with a pistol and revolver."

That pursuant to the said Indictment and in accord with Section 301 of the Code of Criminal Procedure of the State of New York, a Bench Warrant was thereupon issued for the arrest and apprehension of the defendant (1485, 1486, 1847, 1848, 1849).

That the form of Bench Warrant employed in the State of New York, pursuant to Legislative Mandate (Section 301, *supra*) reads substantially, as follows:

> "* * * You are therefore, commanded forthwith to arrest the above named * * * and bring him before that Court * * * to answer the Indictment; or if the Courts have adjourned for the term, that you deliver him into the custody of the Sheriff of the County of * * * or in the City of New York to the Warden of the City Prison of the City of New York. * * * *"

The Activities of the Police Authorities From January 22, 1957 (the Date of the Killing) and February 1, 1957 (the Date of the Filing of the Indictment)

The record herein is clear that immediately following the occurrence, the Police Department of the City of New York, and particularly that of the County of Bronx, including the District Attorney's Office, Bronx County, moved

into action to determine the identity of, and to apprehend the perpetrator of the homicide of the victim herein.

The identity of the defendant was obviously immediately established by means of the witness, Peter Gueriero, who testified that he had known the defendant (the person who entered the premises and fired the shots) for some time (*cf.* 381-383) and thereafter, an immediate search was made by the police for the defendant both at his home and his place of employment (1172-1174, 1553, 1555, 2409-2415).

We can see, therefore, that even though the defendant was at large and had, for all practical purposes, disappeared, nevertheless, the District Attorney, Bronx County moved the instant matter before the Grand Jury for Indictment and did, in fact, obtain an Indictment prior to the apprehension of the defendant, the said District Attorney at the said time (February 1, 1957) apparently agreeable to rely upon the evidence then in the hands of the prosecution exclusive of any evidence to be obtained from the defendant by way of admission or confession at the time of his subsequent arrest.

It is admitted that with the filing of the Indictment, the period of investigation ceased, and the judicial proceeding commenced, and that the situation changed from one being merely suspect to that of being a defendant in an action or proceeding.

The defendant, being at large, and obviously aware that the authorities were in search for him, realizing that he had been the cause of the victim's death, and further, realizing the futility of permanent flight, decided to surrender himself, but only upon the condition that he be afforded whatever legal rights and protection remained.

Thus, we see the following state of events beginning with *February 3, 1957*:

Gaspar Bruno, called by The People, testified in effect as follows:

That he was a member of the Police Department a little over five months (2250); that he knew the defendant approximately 8 to 10 years (2252); that he went to school with defendant and was a close friend of his (2252); that he spoke to defendant on the telephone on February 3, 1957 about 9:25 P. M., and that defendant phoned him (2253-2255); that the defendant stated to him that he was thinking of giving himself up, and wanted some advice; that he didn't know "whether to get a lawyer, or who to give himself up to" (2267); that the defendant stated "that he took a terrific beating, that the deceased hurt him real bad and he dropped him a couple of times and he was dazed; he didn't know what he was doing, and that he went and shot at him" (2267, 2268); that the defendant inquired as to what he thought the law would do to him (2268); that the defendant stated that he was thinking of giving himself up and did not know whether to get a lawyer (2274); and that defendant stated "I am thinking of giving myself up, but I think I should get a lawyer first" (2277); that the defendant stated "I was in a daze. I had had a few drinks. I went over and I shot at him" (2280); and further, "I had a few drinks. I lost my mind. I was in a daze" (2281).

The Events of February 4, 1957

One CHARLES CICCONE, a New York City Detective, called by the People, testified in substance as follows:

That on February 5, 1957, at or about 9 P. M., at the District Attorney's office, Bronx County, he knew that an attorney, one Russo, had theretofore surrendered the defendant (1234, 1235); that he later saw the defendant (about 12:30 P. M.—February 5, 1957) at the 46th Squad Police Station (1239); that the defendant was in the inside room from which he was not permitted to go out about five hours (1253); that the defendant during said time asked him to get Mr. Russo (1254-1269).

Detective THOMAS M. FARRELL, called by The People, testified in substance, as follows:

That he arrived at the Walton Avenue side of the Bronx County building (District Attorney's Office, Bronx County) about 6:25 P. M. on February 4, 1957 (1808) pursuant to police information; that he came there with Mr. Goldsmith, the Assistant District Attorney, Lieut. Gannon, Detective Lehier, and Sgt. Clarke; that they all met in front of the building on the Walton Avenue side (1809); that he saw the defendant walking on the street south from 161st Street and walking towards the entrance of the building (1811); that the defendant was accompanied by an attorney, Tobias A. Russo (1812); that they (the detectives and the Assistant District Attorney) received the defendant; that he was surrendered by his attorney (1813); that he (the defendant) was taken up to the Assistant District Attorney's office in the building (1814); that he was no longer accompanied by his attorney; that the defendant was seated and refused to make any statement (1815); that defendant stated "that you will have to see my attorney" and "I can't make any statements" and he said "I am not making any statements" (1815); *that this was about 7:15 P. M. on February 4th and we remained there in said building until about 12:15 midnight* (1815); that during all that time the defendant answered "nothing" (1816); that he would tell us nothing but his name; that the defendant was supplied with food and ate (1817); that after 12:15 (now February 5, 1957) they went up to the 46th Precinct, Ryer Avenue Police Station (1818); that he (Detective Farrell) was there at all times from 7:15 P. M. on February 4th to 4 A. M. on February 5, 1957 (1820); that the Assistant District Attorney (Goldsmith) was likewise present during all of said time (1820, 1821); that he attempted to talk to defendant but "He wouldn't talk to me, no sir" (1823); that there did come a time when the defendant did talk and that was about 3:30 A. M. on February 5, 1957 (1824); that there was a stenographer present (1824).

Upon cross-examination, the witness stated that defendant, in refusing to answer, said "you would have to see my

lawyer" (1837); " * * * I tell you nothing but my name"; that in the face of that, they continued to interrogate defendant in said building for five hours in Mr. Goldsmith's office (1840); that prior to the statement being taken from the defendant, Officer Bruno had been in the room with the defendant (1890) for about an hour; that at 12:30 nobody could get a statement as the defendant insisted that the police officers talk to his lawyer (1893); that the first time defendant made a statement was at 3:25 A. M. (1893); that the defendant prior to that had said "See my lawyer" (1902).

Detective MARSHALL LEHRER, called by the People, testified substantially, as follows:

That at or about 7:15 or 7:30 P. M., on February 4th, 1957, the defendant, in response to questions by the Assistant District Attorney, stated: "All I was told was to give you my name and nothing else; on the advice of my lawyer, I'm making no statement" (2115, 2124) that this continued until about 3:20 or 3:30 A. M. on February 5, 1957.

Patrolman Bruno further testified that at or about 1:15 A. M. on February 5, 1957, the defendant stated to him that his lawyer had instructed him to keep quiet and he told the officer that he would want to see his lawyer (2351, 2352) and he stated that he wanted to see his lawyer, Russo (2553); that he (the officer) came out of the room and informed the other officers that he wanted to see his lawyer, but that at no time was his lawyer obtained for him (2354); that he (the officer) despite the fact that he informed the other officers that defendant would make no statement and that he wanted his lawyer, nevertheless, was told to go back in with defendant (2362, 2363, 2364) and this continued until about 4 A. M.; that the officer (Bruno) was to prevail upon the defendant by telling him that his (defendant's) phone call got the officer in trouble (2367); that he (the officer) did in fact, tell the defendant that due to his phone call the officer was in trouble and the officer then stated to defend-

ant to "make a statement so I can get out of this trouble" (2368); that he (the officer) between 1:15 P. M. and approximately 4 A. M. went back and forth into the room with defendant pleading with him to make a statement because of the officer's children and all the while, the defendant refused to make a statement, and was calling for his lawyer (2368-2373); that he (the officer) was sent in to the defendant a fourth time by Lieut. Gannon; that he (the officer) told the defendant that if he made a statement, the Assistant District Attorney would help the defendant, whereupon he was yanked out of the room by Lieut. Gannon (2384).

The Characters Involved

The deceased, Frank Palermo, Jr., as we have heretofore noted; aged approximately 28 years, had been a professional pugilist from 1945 to 1951 and had fought in the various arenas in and around the City of New York, including Madison Square Garden, and, at one point in his career was reputed to be a moderately successful boxer; that he had retired or withdrawn from the said field of boxing as a profession in 1951 or 1952 (94-96); that thereafter he had worked intermittently at construction work, and also at Curtiss-Wright Aircraft Corporation (96); that he had been married, but the same had terminated in divorce; that the issue of the said marriage, a daughter (10 years of age) was living with the mother, who had thereafter remarried (97-98); that his general reputation was that of a trouble maker, characterized generally by viciousness and violence (2786, 2795); that at the time of the unfortunate occurrence herein, the deceased was in the company of three ex-convicts (387, 877, 878, 1017, 1018, 1091, 1092 and pp. 1446 and 1466, Record on Appeal); that the deceased and his "cronies" had apparently been carrying on a mild form of petty extortion in the neighborhood (in lieu of work) with a veiled threat of physical harm upon non-compliance, and the defendant herein was not

only the object of continuous demands, but his attempt to repel continued encroachments upon his property resulted in the vicious and cruel attack and beating which precipitated the subsequent events.

The petitioner-defendant, Vincent Joseph Spano, aged 27 years as aforestated, had been known in the area for a long time including his school days (2252, 2328); that he had no criminal record and had a consistent record of employment, and had been and was still in the employ of Curtiss-Wright Aeronautical Corporation at the Woodbridge plant in New Jersey until the within unfortunate event (1172-1187); the petitioner had been a member of the United States Army and was honorably discharged therefrom (Defendant's Exhibits 4 and 5, pp. 1470 *et seq.* and 1492 *et seq.*, Record on Appeal); the petitioner had received elementary and junior high school education (Cf. p. 1472, Record on Appeal).

POINT ONE

The refusal on the part of the Assistant District Attorney and the officers of the Police Department of the City of New York to allow defendant who had voluntarily surrendered with his attorney to consult and to confer with said attorney, whom the defendant had previously retained, upon the said defendant's repeated demands for a period of upwards of eight (8) hours, prior to extracting a written confession from the said defendant by overriding and superseding the judgment and will, both of defendant and of defendant's attorney by means of cajoling, trickery and undue influence all of which took place after investigation and subsequent to indictment where the accused was no longer suspect, but a defendant in a judicial proceeding theretofore instituted by said indictment and bench warrant issued pursuant thereto, constituted a denial of due process of law under the XIVth Amendment of the United States Constitution.

The record is clear that prior to defendant's confession, he repeatedly, and for a period of approximately eight (8) hours, called for, demanded and insisted upon conferring and consulting with his lawyer, whom he had retained theretofore for the said express purpose and protection, all the while asserting that he would give his name and nothing more, and that he would make no statement, and that he had been so advised by his attorney, but the said demands were ignored by the Assistant District Attorney and the Police Officials, until finally at or about 3:30 A. M. on February 5, 1957 (the defendant having voluntarily surrendered with his attorney at about 7 P. M. on February 4, 1957) the defendant's judgment and the judgment and advice given the said defendant by his said attorney were overridden and superseded in favor of the said Assistant District Attorney and the Police Officials, by means of cajoling, exhorting, and pleading to the point of

exhaustion and finally by trickery and fraud in the usage of a friend of defendant's, a member of the Police Department, under the pretense of loss of job and difficulties to his family and infants, attendant upon, and imminent unless a statement were obtained, the defendant was finally forced to yield his better judgment and the wisdom and judgment of his attorney, and, reliquishing the same, the said defendant now faces the death sentence following a trial in the County Court, County of Bronx, where the said within confession so obtained was declared admissible in evidence with damning and devastating effects upon the said defendant.

It is the contention of the defendant herein that the said confession was involuntary within the purview and intent of the XIVth Amendment of the Federal Constitution, and that the obtaining of it, its method, etc., as well as its subsequent usage at the trial was so shocking, and so inimical to our inherent standards of decency, justice and fundamental fairness, that it must be declared repugnant to the said Due Process Clause.

It is the further contention of the defendant that the confession, as so obtained, violated the Fifth Amendment of the United States Constitution providing that no person "shall be compelled in any criminal case to be a witness against himself", as well as the provisions of the New York State Constitution, Article I, Section 6, which provides "• • • nor shall he be compelled in any criminal prosecution to be a witness against himself • • • no person shall be deprived of life, liberty or property without Due Process of Law".

We have in mind distinctly that, with respect to the aforesaid privilege against self-incrimination, that this Court has held that the same is distinctly within the sovereignty and power of the separate States, and that this Court will not intervene under its broad supervisory and blanket power under the XIVth Amendment, unless the

conditions which obtained under so-called State power are so shocking to one's sense of decency and fundamental fairness, that necessity of a dignified jurisprudence and equitable standards fairly shrieks for relief.

See,

Adamson v. *California*, 332 U. S. 46 (1947);
Snyder v. *Massachusetts*, 291 U. S. 97, 105;
Palko v. *Connecticut*, 302 U. S. 319, 324;
Twining v. *New Jersey*, 211 U. S. 78, 91-98;
Cf. *Rochin* v. *California*, 342 U. S. 165, 171, 172;
Malinski v. *People of the State of New York*, 324 U. S. 401, 412-418.

It is urged herein that the facts in the case at bar warrant the intervention of this Court's power under the Due Process Clause of the XIVth Amendment under the doctrine of fundamental fairness and under the principles espoused in *Rochin* v. *California* (*supra*), that the conditions which prevailed herein are so shocking to one's decency that they cannot possibly prevail in a civilized State.

It has been heretofore well established by this Court that the XIVth Amendment will be employed to curb and to condemn coerced confessions in State prosecutions.

Brown v. *Mississippi*, 297 U. S. 278;
Watts v. *Indiana*, 338 U. S. 49;
Fikes v. *Alabama*, 352 U. S. 191;
Crooker v. *California*, 357 U. S. 433 (decided June 30, 1958 and subsequently to be referred to herein).

The facts herein are undisputed in the record with respect to the engagement of an attorney by the defendant prior to surrender, the said attorney's advice, the defendant's repeated demand for his attorney, the fact that all of this occurred after Indictment and Bench Warrant, and after a Judicial Proceeding against defendant had been

instituted, so that this Court may properly intervene on the said undisputed facts.

Stroble v. *California*, 343 U. S. 181;
Thomas v. *Arizona*, 356 U. S. 390;
Vogue v. *Arkansas*, 356 U. S. 560;
Crooker v. *California*, 357 U. S. 433.

In line with the above, it is urged that the confession obtained herein was not voluntary and was not the exercise of petitioner's free will and that Section 395 of the Code of Criminal Procedure of the State of New York (dealing with physical coercion, which has now been construed to include psychological coercion) is not the sole standard to be employed prior to sending a defendant to his death, and that there always remains the restraining and protective arm of the XIVth Amendment to call upon the States to give an account of their stewardship of all persons and citizens, both Federal and State.

It is not urged herein that concurrently with an arrest, a suspect may shout for a lawyer, and thus constrict and shackle police investigation—it will be urged herein, however, that the case at bar is glaringly and patently distinguishable from *Crooker* v. *California* (*supra*) and *Cicenia* v. *LaGay*, 357 U. S. 504.

It is fully understood herein that the bare fact of police detention and police examination in private of one in State custody does not *per se* render involuntary a confession by one so detained (*Brown* v. *Allen*, 344 U. S. 443), nor does the situation change from the standpoint of the Due Process Clause of the XIVth Amendment if we are to accept the majority opinions in the *Crooker* v. *California* case (*supra*) and the *Cicenia* v. *LaGay* case (*supra*), and, for purpose of this brief, we are willing to proceed on the theory that even if said cases had been decided by a unanimous Court in line with the majority, nevertheless, the result in the case at bar must be otherwise.

It must be borne in mind that the cases of *Crooker* v. *California* (*supra*), *Cicenia* v. *LaGay* (*supra*) and *Stroble* v. *California* (*supra*) are all cases involving statements taken during the period of investigation, concurrently with the arrest and prior to the institution of any judicial proceeding, and in none of the said cases had they, at the time of the confession obtained, reached a point where an Indictment had been found.

The Right to Counsel

In *Cooley on Constitutional Limitations,* 8th Edition, Vol. I at page 696 *et seq.,* it is stated:

> "Perhaps the privilege most important to the person accused of crime, connected with his trial, is that to be defended by counsel."

After alluding to the practice and cases in England, the author states at page 700:

> "With us, it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel, and generally it will be found that the humanity of the law has provided that, if the prisoner is unable to employ counsel, the Court may designate someone to defend him who shall be paid by the Government; but when no such provision is made, it is a duty which counsel so designated owes to his profession, to the Court engaged in the trial, and to the cause of humanity and justice.
>
> * * * In guaranteeing to parties accused of crime the right to the aid of counsel, the Constitution secures it with all its accustomed incidents. * * * "

The right to the aid of counsel includes the right to communication and consultation with him.

Ex Parte Rider, 50 Cal. App. 797;
Lanza v. *New York State Joint Leg. Comm.,* 3 N. Y. (2d) 92;
Fusco v. *Moses,* 304 N. Y. 424.

In New York State, the Constitution in Article I, Section 6, makes provision for the right to counsel of an accused in criminal cases, and the Code of Criminal Procedure of New York in Sections 8, 188, 189, and 308 likewise so provides in conformity with the said Constitution.

The right to counsel to an accused in a criminal case has been universally presumed to be a derivative of the provision of the Due Process Clause of the XIVth Amendment.

It has been stated in *Crooker* v. *California* (*supra*), at page 439:

> "That right, secured in State prosecutions by the Fourteenth Amendment, guaranty of Due Process, includes not only the right to have an attorney appointed by the State in certain cases, but also the right of an accused to a fair opportunity to secure counsel of his own choice." (*Powell* v. *Alabama*, 287 U. S. 45, 53; *Chandler* v. *Fretag*, 348 U. S. 3.)

The said opinion further states that the right to counsel includes not only the right at the trial, but also refers to any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of "that fundamental fairness essential to the very concept of justice."

> *Lisenba* v. *California*, 314 U. S. 219;
> *Moore* v. *Michigan*, 355 U. S. 155.

We have observed this Court in *Betts* v. *Brady*, 316 U. S. 455, refuse to employ the Due Process Clause of the XIVth Amendment in order to vitiate State proceedings, where there was a failure on the part of the State Court to appoint counsel for an indigent defendant, in a *non-capital* case on the theory that the proceeding in the State Court could not be declared as so shocking or as so lacking in fundamental fairness so as to warrant Federal intervention.

We have likewise observed in *Powell* v. *Alabama*, 287 U. S. 45, the rule to be otherwise in a *capital case* where it was held that the right of the accused, at least in a capital case, to have the aid of counsel for his defense, which includes the right to have sufficient time to advise with counsel and to prepare a defense, is one of the fundamental rights guaranteed by the Due Process Clause of the Fourteenth Amendment.

In this case (as in the case at bar) SUTHERLAND, J. writing for the Court, stated at page 52:

> "The sole inquiry which we are permitted to make is whether the Federal Constitution was contravened * * * and as to that, we confine ourselves * * * to the inquiry whether the defendants were in substance denied the right to counsel, and if so, whether such denial infringes the Due Process Clause of the Fourteenth Amendment."

And at page 57, the Court states:

> "In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough going investigation and preparation were actually important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

The history of the principle of the right to counsel, its development in our law and its universal acceptance in this country as part of our inherent American Ideals, having in mind, fundamental fairness in accord with our concept of justice is fully treated in the opinion of Mr. Justice Sutherland (*supra*).

In the dissenting opinion of Mr. Justice Douglas in *Crooker* v. *California* (*supra*), it is stated:

> "The Court finds no prejudice from the denial of the right to consult counsel; and it bases that finding on the age, intelligence and education of the petitioner. But it was said in *Glasser* v. *United States*, 315 U. S. 60 • • •
>
> • • • 'The right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge in wise calculations as to the amount of prejudice arising from its denial.' That was a Federal prosecution. But what is true of the need for counsel in a Federal case is equally true in a State case."

In the said dissent, Mr. Justice Douglas stated in effect that whatever may be the situation with respect to the rule of *Betts* v. *Brady* (*supra*) in a non-capital case, that certainly such a rule was not intended to apply to a capital case, citing *Powell* v. *Alabama, supra.*

Mr. Justice Douglas refers to the fact that both the majority and the dissent agree that the right to counsel extends to pretrial proceedings as well as the trial itself—. "The need is as great then as at any time. The right to have counsel at the pretrial stage is often necessary to give meaning and protection to the right to be heard at the trial itself" (p. 442, Opinion of Justice Douglas).

Cf. *Chandler* v. *Fretag*, 348 U. S. 3.

And at page 443 of the said dissent of Mr. Justice Douglas, it is stated:

> "The third degree flourishes only in secrecy. One who feels the need of a lawyer and asks for one is asking for some protection which the law can give him against a coerced confession. No matter what care is taken, innocent people are convicted of crimes they did not commit. See Borchard, *Convicting the Innocent* (1932); Frank and Frank, *Not Guilty* (1957). We should not lower the barriers and deny the accused any procedural safeguard against coercive police practices."

Mr. Justice Douglas stresses (at p. 444) that the trial of the issue of coercion is seldom helpful to the defendant, because law officers will testify one way and the accused another, and the defendant has very little chance to prove coercion.

And at page 445:

> "For what takes place in the secret confines of the police station may be more critical than what takes place at the trial.
>
> If at any time, from the time of his arrest to final determination of his guilt or innocence, an accused really needs the help of an attorney, it is in the pre-trial period. * * * Indeed, the pre-trial period is so full of hazards for the accused that, if unaided by competent legal advice, he may lose any legitimate defense he may have long before he is arraigned and put on trial."

In the footnote of the dissent, there is set forth an excerpt from an article by Dean Roscoe Pound, wherein he states in effect that police officials not only apply the third degree method, but are so bold even as to publicize it as if it were an authorized, lawful and appropriate practice.

See also,

> *Right to Counsel Prior to Trial,* 44 Ky. L. J. 103; Zechariah Chafee, *Documents on Fundamental Human Rights,* Pamphlets 1-3 (1951-1952), 1541.

In the instant case, we do not have a confession or a statement made concurrently with an arrest by police officers prior to arraignment as is the usual case, and as existed in *Crooker* v. *California* and *Cicenia* v. *LaGay.*

Here, we have a situation where the investigative state is terminated and the District Attorney and the Police have already marshalled their array of evidence and presented the same to a Grand Jury and an Indictment has been re-

turned and filed and the suspect not only has been identified and detected, but has now become a *defendant* in a criminal action then pending.

Cf. Footnote of the Scot's view at page 446 of the Dissenting Opinion in *Crooker* v. *California, supra;*
Cf. Mallory v. *U. S.*, 354 U. S. 449.

In the case at bar, the extended examination of the defendant for a period of eight hours to the exclusion of his attorney was not for the purpose of detecting or ascertaining the commission of a crime from one who was suspect—it was rather to obtain evidence to justify and to support an Indictment already found and to use said evidence thus obtained upon the trial in support of a conviction.

Balancing Interests Between Law Enforcement and the Rights of a Defendant

At page 441 of the opinion of Mr. Justice Clark in *Crooker* v. *California* (*supra*) one cannot overlook the thought underlying, when he wrote:

> "Refusal by State Authorities of the request to contact counsel necessarily would then be an absolute bar to conviction. On the other hand, where an event has occurred while the accused was without his counsel, which fairly promises to adversely affect his chances, the doctrine suggested by petitioner would have a lesser, but still devastating effect on enforcement of criminal law, for it would effectively preclude police questioning—fair as well as unfair—until the accused was afforded an opportunity to call his attorney."

We find the same thought prevailing and expressed in the opinion of Mr. Justice Harlan (writing for the majority of the Court) in *Cicenia* v. *La Gay, supra,* at page 509, where it is stated:

> "On the one hand, it is indisputable that the right to counsel in criminal cases has a high place in our

scheme of procedural safeguards. On the other hand, it can hardly be denied that adoption of petitioner's position would constrict State Police activities in a manner that in many instances might impair their ability to solve difficult cases. A satisfactory formula for reconciling these competing concerns is not to be found in any broad pronouncement that one must yield to the other in all instances."

It is urged (in the light of the above fears of unduly hampering law enforcement) that the said fears are groundless on the facts in the case at bar.

Let us assume that the defendant herein (instead of being surrendered at 7 P. M.) was surrendered to the Court wherein the Indictment lay and to the Judge who signed the warrant at 10 A. M. at the opening of Court.

The said defendant would then and there necessarily have to be arraigned on the warrant, and, it being a judicial proceeding—would it not be incumbent upon the arraigning Judge to advise defendant of his Constitutional rights and of his right to remain silent?

Cf. People v. *McMahon*, 15 N. Y. 384;
People v. *Mondon*, 103 N. Y. 211;
Gallegos v. *Nebraska*, 342 U. S. 55.

And in the above situation (with a judicial proceeding pending—though not of the gravity of an Indictment) wherever confessions were taken thereafter—they were excluded and declared inadmissible—in instances where the arraigning Judge failed to advise as to Constitutional rights.

So that the case at bar becomes restricted to that narrow class of cases where there is an Indictment—there is an attorney but the defendant is surrendered at an untoward time or when the Court is closed.

The District Attorney may respond that he could delay arraignment, to which we reply—not in the case of an Indictment.

If the District Attorney could delay arraignment after Indictment until a confession was procured—then, we say that by ratifying the acts herein, this Court would be empowering every District Attorney in the 48 States to visit, interrogate all defendants sitting in jail awaiting trial, even though represented by counsel, and even though judicial proceedings were in full swing.

It is urged that any confessions so obtained would certainly be condemned and the subject of force (physical or psychological) would be of no consequence.

It should be borne in mind that force is immaterial in the case of a defective arraignment—we are dealing with rights in the defendant.

Cf. People v. *McMahon, supra;*
People v. *Mondon, supra.*

It is urged, therefore, that in the instant case, the Assistant District Attorney and the Police have caused their own situation and have constricted themselves by proceeding to Indictment and thus initiating a Judicial proceeding; it is they who have thrown the defendant into the character and status of defendant as distinguished from suspect.

If, having done so, they later find (as in the case at bar) that all they have is evidence of a homicide which is a far cry from evidence sufficient to justify a deliberate and premeditated killing with malice aforethought, then let them not look to the defendant (after Indictment to supply the missing link) because the defendant chooses to stand his ground to meet the Indictment, and to surround himself with all the protection that the law affords any other defendant in any other criminal proceeding.

POINT TWO

The petitioner-defendant herein was denied due process of law under the Fourteenth Amendment by the admission into evidence over objection and exception of a confession which was taken from him involuntarily and while in custody, and after he had been in such custody for upwards of eight hours during all of which time the said defendant demanded and insisted upon consulting with his attorney prior to making any statement, and against which he had been advised until ultimately, and after continued interrogation, the authorities succeeded by coercion in prevailing upon said defendant to relinquish the said advice and to supersede the judgment and advice, both of the defendant and his attorney, thus yielding to the authorities and, by virtue of all of the aforesaid, to render a statement which was thereafter admitted in evidence against the said defendant—all of which occurred subsequent to indictment, and after the defendant, through his attorney, had voluntarily surrendered pursuant to a Bench Warrant issued out of the judicial proceeding instituted by the said indictment.

The Trial Court below as well as the majority opinion in the Court of Appeals proceeded along the theory that if there were no physical or psychological coercion established by the defendant, then *ipso facto*, the confession thus obtained was voluntary as a matter of law, and, therefore, properly admissible in evidence, citing as the criterion or yardstick to be employed in determining admissibility, Section 395 of the Code of Criminal Procedure of the State of New York, declaring in effect that a confession can be given in evidence against a defendant:

> "* * * where made under the influence of fear produced by threats, or unless made upon a stipulation of the District Attorney, that he shall not be prosecuted therefor; * * *"

It is urged herein that the blanket of protection afforded to a defendant in a State prosecution in a capital case is not circumscribed or limited by said Section 395 of the said Code or any other State Legislative enactment, but that prior to a life being forfeited, the proceedings in the State Court are subject to the ever present and awe inspiring power of this Court to determine in review whether the said proceedings complied with and were in consonance with the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

We shall see hereinafter cited many instances of confession extracted minus the element of force and fear (physical or psychological) and yet this Court has declared said confessions to be coerced and to be involuntary within the intendment of the Fourteenth Amendment and based upon the theory of fundamental fairness, has reversed and set aside convictions on the ground that the confessions obtained and admitted into evidence were not in conformity with our concept of justice.

In connection with the above, it is important at this point to consider and to analyze the authorities.

In the case of *Chandler* v. *Fretag*, 348 U. S. 3, it was held that by denying to the defendant any opportunity to obtain counsel as to a crime (punishable by life imprisonment) the Trial Court denied him the Due Process of Law guaranteed by the Fourteenth Amendment.

It was held that regardless of whether petitioner would have been entitled to have counsel appointed by the Court, his right to be heard through his own counsel was unqualified. (*Betts* v. *Brady*, 316 U. S. 455, Distinguished.)

In the case of *Glasser* v. *U. S.*, 315 U. S. 60, at page 71, it was stated:

> "Upon the Trial Judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused * * *. Mr. Justice Sutherland

wrote that our duty is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial, or from any of the essential elements thereof, and with a caution, increasing in degree as the offenses dealt with increase in gravity. *Patton* v. *United States*, 281 U. S. 276, 312-313.

The Trial Court should protect the right of an accused to have the assistance of counsel. This protecting duty imposes the serious and weighty responsibility upon the Trial Judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the Trial Court, and it would be fitting and appropriate for that determination to appear upon the record." *Johnson* v. *Zerbst*, 304 U. S. 458, 465.

In the case of *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269 (126 Fed. (2d) 774). At page 279 of the opinion (Frankfurter, J. writing for the Court), it was stated as follows:

"The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in Court. But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open." *Johnson* v. *Zerbst*, 304 U. S. 458, 468, 469.

We see from the above cited cases, the extreme delicacy and care which this Court has made requisite for Trial Courts in connection with the Constitutional right of an accused to be represented by counsel. Indeed, this Court has made it incumbent upon Trial Courts to be cautious and circumspect wherever a defendant has sought to waive or strip himself of the right to counsel by making certain that the same was a knowing and intelligent waiver.

In the case at bar we have the converse. The defendant, realizing that he has caused the death of another, and further realizing his own incapacity to handle the problem and his own limitations, and being panic stricken because he knows the stake involved, seeks advice, safety and protection at the hands of an attorney, whom he retains for said purpose. Is there anything unnatural in that?

When the famed Clarence Darrow was indicted (as we are told) in Kansas City, in 1914, and charged with bribery of a juror, even he (brilliant though he was) knowing that the stake was his own, sought out and retained Earl Rogers, Esq. from the Pacific Coast for protection.

When the astute and resourceful Isidor Kresel, Esq. was indicted in New York County, he likewise sought out and retained the distinguished John W. Davis, Esq. for advice and protection.

And so, in the case at bar, the petitioner abject with fear, sought out and retained one Tobias A. Russo, Esq., for advice and protection.

The State herein, however, viewed the situation otherwise, and denied and repelled his demands and precluded him from the said advice and consultation which he sought and needed and to which he was entitled.

In the case of *Glasser* v. *U. S.*, 315 U. S. 60 at 77, it was stated:

> "The right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge

in nice calculations as the amount of prejudice arising from its denial."

In the case of *Haley* v. *Ohio*, 332 U. S. 596, at page 1599, it was stated as follows:

> "But the ruling of the Court and the finding of the jury on the voluntary character of the confession do not foreclose the independent examination which it is our duty to make here. Ashcraft v. Tennessee, 322 U. S. 143, 147-148. If the undisputed evidence suggests that force or coercion was used to exact the confession, we will not permit the judgment of conviction to stand, even though without the confession, there might have been sufficient evidence for submission to the jury". *Malinski* v. *New York, supra*, p. 404, and cases cited.

In this case (*Haley* v. *Ohio*) there was no evidence of physical brutality or psychological coercion—the Court stressed the defendant's age and the absence of counsel, and the police working in relays over a period of 5 hours to override the defendant's judgment.

Frankfurter, J., in a concurring opinion, at page 606, stated as follows:

> "It is suggested that Haley's guilt could easily have been established without the confession elicited by the sweating process of the night's interrogation. But this only affords one more proof that in guarding against misuse of the law enforcement process, the effective detection of crime and the prosecution of criminals, are furthered and not hampered."

And further at page 606:

> " 'Conduct under duress involves choice'. Union Pacific R. Co. v. Public Service Commission, 248 U. S. 67, 70, and conduct devoid of physical pressure but not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint.

> Unhappily, we have neither physical nor intellectual weights and measures by which judicial judgment can determine when pressures in severing a confession reach the coercive intensity that calls for the exclusion of a statement so secured. Of course, the police meant to exercise pressures upon Haley to make him talk. That was the very purpose of their procedure. In concluding that a statement is not voluntary which results from pressures, such as were exacted in this case to make a lad of fifteen talk when the Constitution gave him the right to keep silent, and when the situation was so contrived that appreciation of his rights, and thereby the means of asserting them were effectively withheld from him by the police. I do not believe I express a merely personal bias against such a procedure. Such a finding, I believe, reflects those fundamental notions of fairness and justice in the determination of guilt or innocence which lie embedded in the feeling of the American people, and are enshrined in the Due Process Clause of the Fourteenth Amendment. To remove the inducement to resort to such methods, this Court has repeatedly denied use of the fruits of illicit methods.
>
> Accordingly, I think Haley's confession should have been excluded and the conviction based upon it should not stand."

In the case of *Malinski* v. *New York*, 324 U. S. 401, at page 404, it was stated as follows:

> "If the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. Ashcraft v. Tennessee, supra, p. 154. And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. Lyons v. Oklahoma, 322 U. S. 596, 597."

In the case of *Lyons* v. *Oklahoma*, 322 U. S. 596, 597, in a footnote at page 597, it was stated:

> "Whether or not the other evidence in the record is sufficient to justify the general verdict of guilty, is not necessary to consider. The confession was introduced over defendant's objection. If such admission of this confession denied a Constitutional right to defendant, the error requires reversal." Bram v. United States, 168 U. S. 532, 540-542 and cases cited.

In the case of *Watts* v. *Indiana*, 338 U. S. 49 at 53, in an Opinion by Mr. Justice Frankfurter, at page 50, it was stated:

> "Thus, while the State Courts have the responsibility for securing the rudimentary requirements of a civilized order, in discharging that responsibility *there hangs over them the reviewing power of this court.*" (Italics ours)

And, at page 53 of the said opinion, it was further stated as follows:

> "A confession by which life becomes forfeit must be the expression of a free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. *When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal.* Eventual yielding to questions under such circumstances is plainly the product of the suction process of interrogation, and therefore, the reverse of voluntary. We would have to shut our minds to the plain significance of what here transpired to deny that this was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his Constitutional right. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open Court with all its safeguards, is so

grave an abuse of the power of arrest as to offend the procedural standards of due process.
This is so because it violates the underlying principle in our enforcement of the criminal law. Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. See Ploscowe, The Development of Preesnt Day Criminal Procedures in Europe and America. 48 Harv. L. Rev. 433, 457-458, 467-473 (1935). Under our system, society carries the burden of proving its charge against the accused, not out of his own mouth. It must establish its case, not by interrogation of the accused, even under judicial safeguards, but by evidence independently secured through skillful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.' 2 Howkins, Pleas of the Crown, C. 46, Sec. 34 (8th Ed., 1824). The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a Magistrate, the right to assistance of counsel—the duty to advise an accused of his Constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands. Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system. It is the inquisitorial system, without its safeguards. Law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilation has evolved for an administration of criminal justice at once rational and effective." (Emphasis supplied)

Reference is again made herein to the Footnote to Mr. Justice Douglas' Dissent in *Crooker* v. *California, supra,* at page 446 thereof, wherein it is stated that the Scot's view was recently stated by the Lord Justice General in *Chalmers* v. *H. M. Advocate,* 1954 Sess. Cas. 66, 78:

"The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion has in their view centered upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, e.g., to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged he has the statutory right to a private interview with a solicitor, and to be brought before a Magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice."

POINT THREE

The contention of the respondent that the defendant herein had made a prior confession to Patrolman Bruno is without merit.

The conversation which the defendant had with Patrolman Bruno was limited to a statement to the effect that he (the defendant) shot Frank Palermo, Jr. (the deceased) and that he (the defendant) was in a dazed condition, that he had been drinking and in substance, that he did not know what he was doing.

In all respects, the said statement was exculpatory with the exception of the admission of the shooting.

The aforesaid statement to the said police officer was not an admission or confession of the crime of Murder in the First Degree (New York, Penal Law, Section 1044, Subd. 1) by any stretch of the imagination.

The said Section reads in part, as follows:

Sec. 1044. Murder in the First Degree defined.

"The killing of a human being, unless it is excusable or justifiable, is Murder in the First Degree, when committed:

1. From a deliberate and premeditated design to effect the death of the person killed * * * "

It is obvious that in order to support the Indictment and to obtain a judgment of conviction, it was essential on the part of the State to establish not only that there was a homicide, but in addition, to establish the elements of the crime of Murder in the First Degree, to wit, that there existed deliberation and premeditation within the intendment of the Statute and that the homicide was not otherwise justifiable or excusable.

This was the reason for the interrogation at the District Attorney's office, and at the Station House on the 4th and 5th days of February, 1957.

The method and stategy employed in the interrogation in the statement was to have the defendant reenact piecemeal each and every act of conduct chronologically on the part of the defendant from the Bar and Grill, to his furnished room, to the procuring of a gun and then, the deliberate tracing of his steps from the said furnished room with the loaded gun to the candy store (all the while seeking to establish deliberation and premeditation from which there could be no escape) and negativing anything that might conceivably be of aid to the defendant, and further a description in detail of what transpired in the candy store negativing again any suggestion of justification or excuse and then, finally establishing immediate concealment and flight.

The aforementioned was not the conversation with Patrolman Bruno on the phone; it was rather a cold, calculated recital drawn from the mouth of the defendant of the crime of Murder in the First Degree.

The statement on the phone to Patrolman Bruno cannot possibly be equated with the incriminating and devastating statement taken from the defendant in the Station House, a statement so precise in nature and content, that its damning and condemning effect could not possibly be eliminated or explained.

The People now have the temerity, before this Court, to declare that there was sufficient evidence otherwise to sustain a conviction. We have previously disposed of such an argument in the cases hereinbefore cited.

The fact remains that the said formal and typewritten confession was used and employed by the People in support of the prosecution to the hilt, and throughout the trial, and throughout the summation and final argument on behalf of the State, and was further referred to in the Judge's charge and it is now sought to be suggested to this Court that said statement may not have influenced the verdict.

CONCLUSION

Wherefore, it is respectfully prayed that the Judgment of Conviction and Sentence of Death herein, as well as the Judgment of Affirmance thereof, be reversed and set aside.

Respectfully submitted,

RITA D. SCHECHTER,
Attorney for Petitioner.

HERBERT S. SIEGAL,
of Counsel.